

**THIS DECISION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB**

Mailed:
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Griffith Laboratories International, Inc.

Serial No. 78290736

Barry W. Sufrin of Gardner Carton & Douglas LLP for
Griffith Laboratories International, Inc.

Scott Oslick, Trademark Examining Attorney, Law Office 108
(Andrew Lawrence, Managing Attorney).

Before Holtzman, Bucher and Walsh, Administrative Trademark
Judges.

Opinion by Walsh, Administrative Trademark Judge:

On August 21, 2003, Griffith Laboratories
International, Inc. ("applicant") applied to register the
mark OPTIMA in standard-character form on the Principal
Register for goods now identified as "food flavorings, not
being essential oils," in International Class 30. The
application claims both first use anywhere and first use in
commerce in November of 2002.

The examining attorney refused registration under
Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), in

view of current Registration No. 1596672, issued May 15, 1990, for the mark OPTIMA in standard-character form for "edible oils and shortenings" in International Class 29. The cited registration specifies a date of first use anywhere and a date of first use in commerce of March 7, 1989. The cited registration has been renewed and is active.

The examining attorney issued a final refusal and applicant appealed. Both applicant and the examining attorney have filed briefs. Applicant did not request an oral hearing. We affirm.

Section 2(d) of the Act precludes registration of an applicant's mark "which so resembles a mark registered in the Patent and Trademark Office . . . as to be likely, when used on or in connection with the goods of the applicant, to cause confusion . . ." 15 U.S.C. § 1052(d). To determine whether there is a likelihood of confusion, we must consider all evidence of record bearing on the factors delineated in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1977). Here, as is often the case, the crucial factors are the similarity of the marks and the similarity of the goods of the applicant and registrant. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). In

addition to those factors, we will also address applicant's argument that the purchasers of the goods are sophisticated, and as such, less likely to be confused.

Comparison of the Marks

Applicant makes no mention of the marks, as such, in its argument. This is understandable because the marks are identical. That is, applicant's mark and the cited mark are both simply the standard-character version of OPTIMA. Furthermore, as the Board observed in a similar case, " . . . in a situation such as this, where both parties are using the identical designation, . . . the relationship between the goods on which the parties use their marks need not be as great or as close as in the situation where the marks are not identical or strikingly similar." Amcor, Inc. v. Amcor Indus., Inc., 210 USPQ 70, 78 (TTAB 1981).

Comparison of the Goods

Applicant argues that there are differences between the goods of applicant and registrant. In this regard, Applicant states, "Applicant's goods have a different application and utility from the registrant's goods, making confusion even more unlikely." Applicant adds, "While Applicant's food flavorings are added to food to enhance their savor, the cited registrant's edible oils and shortening are added to food to affect its texture. As

such, the distinct application and functionality of the products makes confusion between the marks unlikely."

The examining attorney argues, on the other hand, that, "the issue on appeal is not likelihood of confusion between applicant's food flavorings and registrant's edible oils and shortening, or the particular uses of each, but the likelihood of confusion as to the source of these goods." (citations omitted) The examining attorney argues more broadly, "Thus, the conditions surrounding the marketing and usage of the goods is such that the same potential consumers could encounter the goods and believe that they come from a common source."

First, we must concur with the examining attorney's caution that our focus must be the likelihood of confusion as to the source of the goods, not confusion as to the goods themselves. In re Rexel Inc., 223 USPQ 830, 831 (TTAB 1984).

To support his position that the goods are related, the examining attorney has provided copies of several third-party registrations claiming use of the same mark on both types of goods, those identified in the application and those identified in the cited registration. The following are among those registrations:

Reg. No. 2221249 for CHEF LOUIS covering, among other things, "edible oils" and "food flavorings not essential oils";

Reg. No. 2333616 for JULIUS MEINL covering, among other things, "flavoring extracts for baking and cooking, which are nonessential oils" and "edible oils";

Reg. No. 2696026 for a Design Only Mark covering, among other things, "edible oils" and "food ingredients used as a food flavoring, namely cocoa powder";

Reg. No. 2506682 for a Design Only Mark covering, among other things, "shortening" and "food flavoring extracts, not being essential oils"; and

Reg. No. 2770095 for CULINESSENCE covering, among other things, "edible oils" and "extracts used as flavoring."

These third-party registrations are not evidence that these marks are in use, but they are of some probative value and do indicate that the goods of applicant and registrant are of a type which may emanate from the same source. In re TSI Brands Inc., 67 USPQ2d 1657, 1659 (TTAB 2002); In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993).

The registrations provided by the examining attorney also indicate more broadly that the same mark has been registered for a wide range of foods and food ingredients. In sum, this evidence indicates that the goods of applicant and registrant are related.

The examining attorney has also submitted evidence consisting of recipes which call for the use of both types of goods. For example, the examining attorney has provided several recipes from the web site of the US Highbush Blueberry Council, including: a recipe for "Blueberry Buns" calling for, among other ingredients, "High Ratio Shortening," "Lemon Flavoring" and "Vanilla Flavoring"; a recipe for "Blueberry Cinnamon Rolls" calling for "flavoring" and "shortening"; a recipe for "Blueberry Muffins" calling for "shortening" and "lemon flavor." The examining attorney has also provided a recipe from e-CookBooks at www.e-cookbooks.net for "Red Velvet Cake" calling for "shortening" as well as "butter-flavored extract" and "vanilla extract," as well as a series of recipes from www.greentab.com for "Brown Sugar Pound Cake," "Lemon Pound Cake," "Pineapple Upside Down Cake," "Yellow Layer Cake," and "White Layer Cake" each of which calls for both shortening and some type of flavoring. In addition the examining attorney has provided a series of recipes from www.heartstonebakery.com for several types of breads; many call for both shortening and flavoring, for example, the "Apple Walnut Bread Recipe" which calls for "shortening" and "almond flavoring, cinnamon and vanilla." This evidence indicates that the goods of the applicant and

registrant, though perhaps different in some sense, are used by the same persons, at the same time in performing the same task. This is further evidence that the goods are related. Accordingly, we conclude that the goods of the applicant and registrant are related.

Channels of Trade and Sophistication of Purchasers

Applicant essentially combines arguments which address both the channels of trade and the sophistication of the purchasers. Applicant states, "The purchasers of Applicant's OPTIMA products, which include food manufacturers, lab technicians and food scientists, are highly sophisticated, discriminatory purchasers that are unlikely to be confused between Applicant's mark and the cited mark."

With regard to the channels of trade, we must consider the goods as identified in the application and registration and, in the absence of any restrictions in the channels of trade, assume that the goods travel in all trade channels appropriate for such goods. CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); In re Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991). Neither the application nor the registration at issue here include any restrictions as to the channels of trade. Accordingly, we must assume that applicant's "food flavorings, not being

essential oils," and registrant's "edible oils and shortenings" would travel in all normal trade channels for such products and reach all potential purchasers of such products. Both types of products are common ingredients for food which are widely available for purchase and used by the general public, as well as the narrower class of purchasers identified by applicant. Therefore, we conclude that applicant's goods and registrant's goods could travel through the same trade channels and could reach the same purchasers.

Even if we were to assume that applicant's customers were limited to "food manufacturers, lab technicians and food scientists" we must assume that these same individuals are potential purchasers of registrant's goods, again in the absence of any restriction in the registration. However, even sophisticated purchasers such as those identified by applicant are not immune from trademark confusion. In re Pellerin Milnor Corp., 221 USPQ 558, 560 (TTAB 1983). This is particularly the case where, as here, the marks are identical. In re Total Quality Group Inc., 51 USPQ2d 1474, 1477 (TTAB 1999). In addition, even sophisticated purchasers may not be aware of the range of products offered by a party. In re Decombe, 9 USPQ2d 1812, 1815 (TTAB 1988). Accordingly, we conclude that the

sophistication of relevant purchasers does not diminish the likelihood of confusion in this case.

Conclusion

In conclusion, we have weighed all evidence related to the du Pont factors regarding likelihood of confusion presented in this case and determined that there is a likelihood of confusion between applicant's mark and the cited mark. The principal factors dictating this result are the fact that the marks are identical and the goods of applicant and registrant, as identified, are related and travel in the same or overlapping channels of trade.

Decision: The refusal to register applicant's mark on the ground of likelihood of confusion is affirmed.